

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 94-43

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Kenosha and
Racine, Wisconsin,
in the Milwaukee, Wisconsin
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1994;

Released: May 16, 1994

Comment Date: July 7, 1994

Reply Comment Date: July 22, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is a petition for rule making filed by LeSEA Broadcasting Corporation, the licensee of television station WHKE(TV), Channel 55 (Independent), Kenosha, Wisconsin, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to add the communities of Kenosha and Racine, Wisconsin, to the Milwaukee, Wisconsin television market. *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).¹

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. 76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898

(1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."²

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),³ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. According to the petitioner, Milwaukee, Racine and Kenosha are located in close proximity, with Racine approximately 24 miles south of Milwaukee and Kenosha some 10 miles south of Racine. It notes that each city is a major population center in its own right, each a separate Primary Metropolitan Statistical Area (PMSA) as designated by the United States Office of Management and Budget.⁴ In addition, the petitioner states that Kenosha and Racine are included in both the Milwaukee Survey Area and the "Milwaukee (Kenosha & Racine)" Area of Dominant Influence (ADI) as defined by Arbitron. The petitioner states that the coverage areas of both WHKE and television station WJJA(TV), Channel 49 (Independent), Racine, Wisconsin, licensed to TV-49, Inc., overlap significantly the coverage areas of the seven television stations licensed to Milwaukee. These facts, according to the petitioner, reflect both the commonality of the communities proposed to be added to the market designation and the

¹ The Commission has delegated authority to the staff to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See* Section 0.321 of the Commission's Rules. *See also Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.150 (1993).

² *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592

(1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

³ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴ The petitioner states that these three contiguous PMSAs, located in the southwest corner of Wisconsin, abut the Chicago, Illinois, Metropolitan Statistical Area to the south.

market as a whole, and that WKHE competes for audiences and revenue in a common television market with the stations licensed to Milwaukee and Racine.

6. The petitioner further states that although WHKE is unavoidably competitive with the other market-area stations, amendment of the Commission's Rules as proposed is essential to reflect market realities and to equalize competition among the stations. Specifically, the petitioner states that while WHKE is entitled to carriage on Milwaukee and Racine-area cable systems by virtue of its inclusion in the Milwaukee ADI,⁵ because Kenosha and Racine are not designated communities in the Section 76.51 market listings, the station would be considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.⁶ As a result, the petitioner states, it has already received notifications by several ADI area cable systems that they will not carry the station due to increased copyright liability attendant to the carriage of a "distant signal."⁷

7. Inasmuch as market hyphenations "are based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities," the petitioner states that it meets all the criteria for the requested amendment of Section 76.51. In addition to the proximity of the subject communities and the competitive nature of the market, the petitioner asserts that any concern that cable carriage might be provided in areas beyond WHKE's Grade B signal contour "would no longer seem to have relevance" under the Commission's ADI-based must-carry rules. Nevertheless, it contends that the majority of the Milwaukee-area cable systems which would be affected by the rule change are within the Grade B contours of the Racine or Kenosha stations. The petitioner also states that its particularized need for the requested rule change is demonstrated by the fact that WKHE faces real and immediate concerns that the station will not be carried on area cable systems because of potential copyright liability. Finally, it maintains that the public will benefit from the proposed redesignation because it will bring diversified programming from a local independent UHF station to Milwaukee-area cable viewers.

DISCUSSION

8. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the television stations licensed to Milwaukee, Kenosha and Racine do compete for audiences and advertisers throughout much, if not most, of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole. Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

9. The Commission has stated that it will not restrict the types of evidence parties may submit to demonstrate the propriety of a market adjustment because each case will be unique to the individual factual situation presented.⁸ The petitioner here has alleged that the proximity of the subject communities and the similarity of Grade B signal contours demonstrate the appropriateness of the requested action.⁹ Indeed, from the information attached to the petition, it appears that the stations licensed to Milwaukee place a Grade B or better signal over the communities of Kenosha and Racine; that WJJA provides Grade B or better service to Milwaukee and Kenosha; and that the signals of WJJA and WHKE are subsumed significantly within those of the Milwaukee stations. Accordingly, we believe that the initiation of a rule making proceeding is warranted. Proponents of the change requested, however, should be aware that the standard of proof to change the rules is higher than the standard to simply initiate a rule making proceeding. In this regard, while WHKE appears to provide Grade B service to Racine, it is not clear if, or to what degree such service is provided to Milwaukee, the core city of this market. Under these circumstances, then, it may be helpful to receive additional comment on the competition between WHKE and other stations in the subject market for viewers, programming¹⁰ and advertising revenue, as well as how other media view the market.¹¹

⁵ (See Section 76.56(b) of the Commission's Rules.

⁶ Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Kenosha as a designated community in this market list generally results in WKHE's classification as a "distant signal" for market-area cable systems more than 35 miles from Kenosha. By amending Section 76.51 of the Rules to include the communities of Kenosha and Racine as proposed, the petitioner asserts that market-area cable systems will be able to carry WHKE on an equal basis with those stations in the market without incurring distant signal liability.

⁷ (Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. See *Report and Order* in

MM Docket No. 92-259, *supra*, at 2973-74.

⁸ See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977.

⁹ The petitioner's assertions as to its particularized need for the requested action, *i.e.*, the effect of the copyright compulsory license, is a factor present in virtually all cases of this type. Of itself, however, this factor is not determinative of the appropriateness of a proposed market adjustment. Rather, it is but one of the many types of evidence the Commission may consider in evaluating the competitive nature of a particular television market.

¹⁰ See, *e.g.*, *Notice of Proposed Rule Making* in MM Docket No. 93-290 (Newton, N.J./Riverhead, N.Y.), 8 FCC Rcd 8136, 8137, ¶ 7 (1993). Moreover, the extent of this petitioner's copyright liability; whether such liability actually threatens the viability of the station; or whether the station might qualify as a "specialty station" or "significantly viewed signal" for copyright purposes such that any potential liability might be "alleviated" are not clear. See *Policy Decision Concerning Cable Compulsory License Specialty Station and Significantly Viewed Signal Determinations*, 54 FR 38461 (1989).

¹¹ See, *e.g.*, *Notice of Proposed Rule Making* in MM Docket 93-291 (Lawrence, Mass.), 8 FCC Rcd 8171, 8172 (1993).

ADMINISTRATIVE MATTERS**Ex Parte Rules -- Non-Restricted Proceeding**

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

11. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 7, 1994**, and reply comments on or before **July 22, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

13. For additional information on this proceeding, contact Alan E. Aronowitz, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

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